IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 28 OF 2002

Anant Shyamsundar Khandekar,
Resident of House No.93,
Deulwada, Naroa,
Bicholim, Goa
(presently lodged at
Central Jail, Aguada) ... Appellant.

versus

State
(through Public Prosecutor) ... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Mr. A. D. Bhobe, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State/ Respondent.

CORAM: A. M. KHANWILKAR &
P. V. HARDAS, JJ.

DATED: 27TH NOVEMBER, 2003.

ORAL JUDGMENT(PER P.V.HARDAS, J.)

The Appellant who is convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life, by the learned Sessions Judge, North Goa, Panaji, by Judgment dated 26th June, 2002, in Sessions Case No. 15 of 2000, on the

allegation that he had committed the murder of his younger sister, by the present Appeal challenges his conviction and sentence as aforestated.

2. The facts in brief as are necessary for the decision of this Appeal are set out hereunder:-

P.W.16, Gajanan Prabhudessai, was in charge of the Bicholim Police Station. On 5th January, 2000, P.W.2, Damodar Marshelkar, a neighbour of the Appellant/Accused filed his report at Exh.9 that his neighbour Miss Sandhya Shyamsundar Khandekar, aged 22 years, was found dead in the bed. On the basis of the said report, an U.D. was registered by P.W.15, Ms. Sunita Sawant. P.W.15, Ms. Sunita Sawant, proceeded to the scene of the offence and recorded the Inquest Panchanama at Exh.7 in the presence of P.W.1, Ramchandra Garde. The dead body of Sandhya Shyamsundar Khandekar was referred for post mortem. The post mortem on the dead body of Sandhya Shyamsundar Khandekar was conducted by P.W.8, Dr. E. J. Rodrigues, who found the following external injuries:-

1. Pressure abrasion covering the tip of nose, both sides alae and ridge in an area of 5 x 3 cms. in irregular manner with drying effect of dark brown colour.

2. Pressure abrasion all round both

lips at muco-cutaneous junction and further extending over left side upper lip of 3 x 0.5 cms. in horizontal fashion, around left angle of mouth of 1.5 x 1 cm. and below lower lip of 4 x 1.5 cms. in horizontal fashion. There is drying effect of dark brown colour of exposed parts of both upper and lower lip.

3. Bruise, reddish, fresh, 3 x 2 cms. lower medial aspect of left arm, 3 cms. below medial epicondyle.

4. Bruise, reddish, fresh, 2 x 2 cms. lower medial aspect of left arm 2 cms. below injury no.3.

5. Abrasion reddish and fresh of 0.5 x 0.5 cms., upper back of right forearm.

3. According to him, all the injuries were caused by blunt force and were ante mortem in nature. On internal examination, he found contusion of skull in an area of 3 x 2 cms. on left side frontal skull region at hair line level and another contusion of 2 x 2 cms, 3 cms. behind the first contusion. Brain was congested. However, there was no edema of the brain. Effusion of blood was present in an area of 1. x .5 cms. He, therefore, opined that death was due to asphyxia by closure of nose and mouth with compression effect on the neck. The Post Mortem Report is at Exh. 23. P.W.15, P.S.I. Sunita Sawant, recorded the statement of the mother of the present Appellant and handed over the investigation to P.W.16, P.I. Gajanan Prabhudessai.

4. On 6th January, 2001, P.W.7, Nandu Kumar Parab, filed a complaint at Exh.21 accusing the Appellant of having committed an offence of murdering the deceased. P.W.16, P.I. Gajanan Prabhudessai, on the basis of the said report, registered an offence against the Appellant/Accused under Sections 302 and 201 of the Indian Penal Code. The Appellant/Accused came to be arrested vide panchanama at Exh.16 in the presence of P.W.6, Hari Gaonkar. During the course of interrogation, the Appellant/Accused is alleged to have made a statement that he would "show the towel". This disclosure statement was made at Exh.18 in the presence of P.W.6, Hari Gaonkar. The said towel is M.O.2. The muddemal property was sent to the Chemical Analyser and the report of the Chemical Analyser is at Exh.40 colly. As per the report of the Chemical Analyser, the towel at Exh.2 was stained with blood. However, the group could not be determined. After completion of the investigation, a charge-sheet against the present Appellant came to be filed.

5. After committal of the case to the Court of Sessions, charge vide Exh.4 was framed by the learned Sessions Judge, North Goa, Panaji, for an offence punishable under Section 302 of the Indian Penal Code. The Appellant/Accused pleaded not guilty and claimed to be tried. The prosecution in support of its case

examined 16 witnesses. The learned Sessions Judge, North Goa, Panaji, accepting the evidence of the prosecution convicted and sentenced the Appellant/Accused as aforestated. The learned Trial Judge while putting the incriminating circumstance to the Appellant/Accused under Section 313 of Criminal Procedure Code has only put the circumstances as appearing in the evidence of P.W.7, Nandu Kumar Parab, P.W.8, Dr. E. J. Rodrigues, P.W.11, Shivangi Parab and P.W.16, Gajanan Prabhudessai.

6. The prosecution has examined the mother of the Appellant/Accused and deceased Sandhya as P.W.4. P.W.4, Sheela Shyamsundar Khandekar, states that deceased Sandhya was the youngest of the two daughters. The elder daughter was married about 10 years back. She states that she was in search of a suitable groom for deceased Sandhya. She has further stated that she knows one Nandu Kumar Parab who is her neighbour and is not a Brahmin. She has stated that she does not know how Sandhya died. On the night, previous to the date of the incident, she had gone to sleep and when she got up in the morning and after preparing tea she gave a call to the deceased Sandhya to wake up. However, Sandhya did not reply, so she went close to her and shook her but found her body to be cold. On the previous night, deceased Sandhya had told P.W.4, Sheela Shyamsundar Khandekar, that she should go to bed as Sandhya wanted to watch T.V. Deceased

Sandhya used to sleep alone. On that night, she, deceased Sandhya and the Appellant were in the house. On seeing Sandhya dead, she had called the Accused and told him to inform the neighbours. The neighbours had also found her body to be cold. On informing that Sandhya was dead, P.W.4, Sheela Shyamsundar Khandekar, became unconscious due to shock. She has further stated that she had not heard any shout or call given by anyone and did not wake up during the night. She was declared hostile by the prosecution in respect of her statement dated 6th January, 2000. Incidentally, it may be stated that her statement was recorded on 5th January, 2000 also and according to the prosecution she resiled from her statement dated 6th January, 2000. She was confronted with the portion in her statement dated 6th January, 2000 and she has denied of having stated the said portions. There is nothing in the cross-examination on behalf of the prosecution which would be of any assistance to the prosecution. Incidentally, the statement dated 6th January, 2000, was recorded by P.W.16, Gajanan Prabhudessai. The prosecution has not proved the statement through P.W.16, Gajanan Prabhudessai. In fact, the contradictions were not put to P.W.16, Gajanan Prabhudessai. The contradictions, therefore, remained unproved.

7. P.W.7, Nandu Kumar Parab, states that he was in

love with deceased Sandhya and deceased Sandhya was insisting that he should get married to her as early as possible as the Appellant/Accused was harassing deceased Sandhya on account of her love affair with P.W.7, Nandu Kumar Parab. He has stated that he is Maratha by caste and deceased Sandhya belonged to Brahmin caste. He stated that deceased Sandhya used to tell him that the Appellant/Accused used to beat Sandhya on account of her affair with P.W.7, Nandu Kumar Parab. He further states that on 2nd January, 2000, he had met Sandhya at the Sankhali bus stand and from Sankhali both of them went to Belgaum and stayed in a hotel at Belgaum and came back to Sankhali on 3rd January, 2000. Sandhya went directly to her sister's place at Valpoi and she was afraid that the Appellant/Accused would scold her. He states that on 5th January, 2000, his sister Subhangi Parab informed him that deceased Sandhya had come on 4th January, 2000, with a message for him to meet Sandhya at Kulaghar on 5th January, 2000. On 5th January, 2000, his sister informed him that Sandhya had expired. He accordingly had filed a complaint at Exh.21.

8. In the cross-examination, he has stated that he was made to wait in the Police Station from 8.00 a.m. to 8.00 p.m. He was unable to state the exact date when Sandhya is alleged to have informed him that the Appellant/Accused was beating her. An omission was

brought out in respect of his complaint at Exh.21 that he had not stated that his sister Subhangi had informed him that deceased Sandhya had come on 4th January, 2000, with a message to meet her at Kulaghar.

9. Prosecution has examined P.W.11, Shivangi Parab. She is the sister of P.W.7, Nandu Kumar Parab. She states that her brother Nandu was in love with Sandhya. The family members of Sandhya were opposing to their love affair. She states that on 3rd January, 2000, in the afternoon, deceased Sandhya had come to her house with a message for P.W.7, Nandu Kumar Parab, that he should meet her on the next day i.e. on 4th January, 2000. She states that deceased Sandhya had also disclosed to her that she had gone to Belgaum with P.W.7, Nandu Kumar Parab. She states that she does not know the cause of death of Sandhya. An omission was brought out in respect of the visit of Sandhya on 3rd January, 2000 and the message for P.W.7, Nandu Kumar Parab to meet her at Kulaghar.

10. P.W.13, Sangeeta Palkar, states that deceased Sandhya wanted to marry her brother P.W.7, Nandu Kumar Parab and the Appellant/Accused was opposing the marriage between them because P.W.7, Nandu Kumar Parab, belonged to lower caste. A day prior to her death, deceased Sandhya had informed her that she had gone with P.W.7,

Nandu Kumar Parab to Belgaum. She states that deceased Sandhya had come to her house and had expressed her apprehension about going back to her own house and at that time her sister Subhangi was present. Deceased Sandhya had left a message for P.W.7, Nandu Kumar Parab to meet her at Kulaghar.

11. The Appellant/Accused on being examined by P.W.8, Dr. E. J. Rodrigues, had the following injuries:-

1. Abrasion of 2 x 2 mm with soft reddish scab on, on proximal inter phalangeal joint of right ring finger, dorsal aspect.

2. Abrasion of 2 x 2 mm with soft reddish scab on, on proximal inter phalangeal joint of left middle finger, dorsal aspect.

3. Abrasion of 2 x 2 mm with soft reddish scab on, on proximal inter phalangeal joint of left index finger.

4. Abrasion of 1 cm x 2 mm over upper medial aspect of right leg with soft reddish scab on.

12. The explanation by the Appellant/Accused for those injuries is that he had suffered the injuries on account of his work in Kulaghar of doing fencing of rubble stone. P.W.8, Dr. E. J. Rodrigues, was not asked by the prosecution regarding the cause of the injuries suffered by the Appellant/Accused. If, it was

the case of the prosecution that the Appellant/Accused had suffered these injuries in his attempt to suffocate the deceased Sandhya, P.W.8, Dr. E. J. Rodrigues, ought to have been examined by the prosecution. An evidence to that effect namely that the injuries were on account of the resistance put up by the deceased Sandhya brought on record. P.W.8, Dr. E. J. Rodrigues, has however stated in the cross-examination that the injuries suffered by the Appellant/Accused could be caused if the fingers are pressed while lifting rubble stones. However, these injuries are abrasions and P.W.8, Dr. E. J. Rodrigues, does not say that they were on account of scratch marks. The injuries which are described by P.W.8, Dr. E. J. Rodrigues, in his certificate at Exh.26 are all minor injuries which could be caused by blunt force. The explanation, therefore, for these injuries tendered by the Appellant/Accused is a probable explanation.

13. The learned Trial Judge, in the absence of any evidence to that effect, has surmised that in his opinion, the injuries No.1, 2 and 3 on the person of the Appellant/Accused could have been caused by the victim while offering resistance to the act of the Accused. The learned Trial Judge, however, went on to surmise that in respect of injury no.4, which was on the upper medial aspect of right leg, it was possible that the

Appellant/Accused had applied his force on the body on "executing homicidal manual smothering or suffocation". The learned Trial Judge further went on to surmise as thus:-

> "Thus, looking into the nature of the injuries sustained to the victim Sandhya and the accused the only inference that can be drawn is that the injuries sustained to the deceased Sandhya were caused by the accused. Similarly the injuries sustained by the accused himself were caused by the victim while offering resistance to the act of the accused".

14. In our considered opinion, there is absolutely no evidence on record to arrive at such a finding. The learned Trial Judge in respect of the evidence of P.W.4, Sheela Shyamsundar Khandekar, mother of the deceased Sandhya, has commented on the admission of this witness that she came to know that Sandhya had died and that no doctor was called for. According to the learned Trial Judge, this conduct of P.W.4, Sheela Shyamsundar Khandekar, appeared to be very strange. The evidence of P.W.4, Sheela Shyamsundar Khandekar, that she went to bed and woke up next day morning and had not waken up during the night time, according to the learned Trial Judge, did not appeal to his mind at all. In substance, the learned Trial Judge has relied on the circumstance in her statement under Section 161 of Criminal Procedure Code

and has reproduced the same in the Judgment in paragraph 5. The learned Trial Judge then curiously records a finding that "the witness was given opportunity to explain the contradictions. However, the witness was not able to offer any explanation. It can be seen that P.W.4, Sheela Shyamsundar Khandekar, had narrated the facts in all the detail to the Police. The statements made by this witness could not have been within the knowledge of the Investigating Officer at the time of recording of her statement. It is difficult to believe that the Investigating Officer had manipulated the facts of the case in order to falsely implicate the Accused in the present crime. I am, therefore, convinced that this witness(P.W.4, Sheela Shyamsundar Khandekar) has conveniently suppressed the truth to save the Accused from the clutches of law. Therefore, it follows that the evidence of P.W.4, Sheela Shyamsundar Khandekar, cannot be discarded in its entirety only on the ground that she had resiled from her present statement made before the Police". Curiously though, the learned Trial Judge does not say on which part of the evidence reliance could be placed on the testimony of P.W.4, Sheela Shyamsundar Khandekar. Apart from the portions from her statement recorded during investigation with which she was confronted, nothing worthwhile has been brought out in the cross-examination which would be of assistance to the prosecution. Whatever little evidence which the learned

Trial Judge found to be reliable was also not put to the Accused in his statement under Section 313 of Criminal Procedure Code. Therefore, in our considered opinion, reliance on the evidence of P.W.4, Sheela Shyamsundar Khandekar, by the learned Trial Judge is wholly misplaced.

15. The evidence of discovery of the towel at the instance of the Accused is wholly doubtful. The learned Trial Judge in his Judgment has nowhere discussed about this circumstance. The panch witness was declared hostile and the discovery, therefore, rests on the sole testimony of P.W.16, P.I. Gajanan Prabhudessai. P.W.16, P.I. Gajanan Prabhudessai, does not speak about the place from where the towel was seized. All that he states is that the towel came to to be attached at the instance of the Appellant/Accused. The other panch witness has not been examined by the prosecution. In these set of circumstances, we find, that the evidence in respect of the seizure of the towel at the instance of the Appellant/Accused is wholly unsatisfactory.

16. We are, therefore, left with only two circumstances. (1) That the Appellant/Accused, P.W.4, Sheela Shyamsundar Khandekar and deceased Sandhya were alone in the house. (2) That the family members of deceased Sandhya were opposing her love affair with

P.W.7, Nandu Kumar Parab and thus, had a motive to kill deceased Sandhya. In respect of the first circumstance, though, P.W.4, Sheela Shyamsundar Khandekar, states so in her evidence, the said circumstance is not put to the Accused in his statement under Section 313 of Criminal Procedure Code. In fact, the circumstances from the evidence of P.W.4, Sheela Shyamsundar Khandekar, have not at all been put to the Accused in his statement under Section 313 of Criminal Procedure Code. Even otherwise, the prosecution evidence does not suggest that apart from the Accused no one else could have committed the crime. Admittedly, this is a case resting on circumstantial evidence as there is no eye witness to the incident. Though, the prosecution examined P.W.4, Sheela Shyamsundar Khandekar, as an eye witness, she was declared hostile. The result is, therefore, that since there is no eye witness to the incident, the case against the Appellant/Accused is based on circumstantial evidence.

17. The next circumstance is in respect of motive namely that the family members and particularly the Appellant/Accused was opposing the marriage of deceased Sandhya with P.W.7, Nandu Kumar Parab as P.W.7, Nandu Kumar Parab belonged to a lower caste. P.W.4, Sheela Shyamsundar Khandekar, in her statement has stated that her elder daughter was married to a person who was not a

Varsha Brahmin, that is a person of lower caste. Assuming that the Appellant/Accused was averse to the marriage of deceased Sandhya with P.W.7, Nandu Kumar Parab, at the most, it can be stated that the Accused had a motive or a "strong reason" for committing the crime.

18. In cases resting on circumstantial evidence, the prosecution is required to prove each and every circumstance. The circumstances so proved should form a complete chain which should exclude every hypothesis of the innocence of the Accused and should unerringly point to the guilt of the Accused. According to us, the only circumstance that is proved is regarding the fact that the Appellant/Accused and P.W.4, Sheela Shyamsundar Khandekar, were present in the house along with deceased Sandhya. However, this as a circumstance cannot be relied upon as the same was not put to the Accused. Assuming however, that this circumstance though, not put to the Accused in his statement under Section 313 of Criminal Procedure Code, can be relied upon coupled with the circumstance of motive, the circumstances so proved do not exclude the hypothesis of the innocence of the Accused and do not point unerringly to the guilt of the Accused. The prosecution has to travel and bridge the gap between "may be true and must be true", which the prosecution has failed to do. Therefore, in our considered opinion, there is no evidence on record for

sustaining the conviction of the Appellant/Accused. Though, unfortunately, a young girl of 24 years has lost her life, who was on the threshold of getting married, we are constrained to allow this Appeal and acquit the Appellant/Accused for want of cogent and reliable evidence proving his guilt.

19. Accordingly, Criminal Appeal No.28 of 2002 is allowed. The conviction and sentence passed against the Appellant/Accused is hereby quashed and set aside and the Appellant/Accused is acquitted for the offence of which he was charged and convicted. His Bail Bonds stand cancelled. Fine if paid be refunded to the Appellant/Accused.

A. M. KHANWILKAR, J.

P. V. HARDAS, J.

RD.